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No. 93-883

In The

Supreme Court of the United States

October Term, 1993

INTERSTATE COMMERCE COMMISSION
AND UNITED STATES OF AMERICA,

Petitioners,

v.

OVERLAND EXPRESS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In an action by a motor common carrier to collect its filed tariff charges may the Interstate Commerce Commission (hereinafter "ICC" or "Commission") declare the carrier's filed tariff retroactively void solely because the carrier had failed to comply with ICC regulations for the determination of distances?

LIST OF PARTIES

Respondent, Overland Express, Inc. (hereinafter "Overland") was an Indiana corporation previously engaged in common carrier transportation of freight in interstate commerce. Petitioners are the Interstate Commerce Commission and the United States of America.

The following were parties to the ICC proceeding: Jasper Wyman & Sons; Codep International; Creamette Co.; Lynn Plastics Corp.; Viviano Macaroni; Furniture Crafts, Inc.; Fibers & Fabrics of Georgia; Cotter & Co; Distribution Transportation Service, Inc.; Country Oven, Inc.; Grinnell Corp.; Purolator; Thompson Consumer; Rudy's Farm Co.; S.T. Semicon; General Motors Corp.; Kroger Co.; Drexel Co.; Alcan Aluminum Corp.; Bear Transportation; BI LO, Inc.; Charley Brothers; Warner Lambert, LTD; Davis Distribution; Life Savers, Inc.; Witco Corp.; Greenman Brothers; L.B. Transport; MSG Arlen Co.; Kraft, Inc.; MTI Freight Systems; Old Dutch Food, Inc.; Marathon Electric Manufacturing Corp.; and Preferred Products.*

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* Respondent is unaware of any parent or subsidiary companies listed for the corporations named in this list of parties.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 996 F.2d 356 (D.C. Cir. 1993). The decision of the Interstate Commerce Commission is reported at 8 I.C.C.2d 246 (1992). The text of both of the opinions below are appended to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Overland concurs with Petitioners' statement of the case with the following exceptions. First, Petitioners improperly refer to the ICC's actions in voiding Overland's mileage based tariffs as enforcement of "long-standing ICC regulations . . . " *See* Petition at 2. However, the record below demonstrated that, during the 1980's, 40% of all carriers that filed mileage-based rates referenced the Household Goods Carriers Bureau (hereinafter "HGCB") Mileage Guide without participating therein. *See Overland*, 996 F.2d at 359. The ICC did not reject any of these allegedly defective tariffs. In addition, it was only after the issuance of the ICC's decision in *Jasper Wyman & Sons – Petition for Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C.2d 246 (1992), and after large numbers of shippers were faced with undercharge suits that the Commission attempted to utilize its regulations to retroactively reject carrier's tariffs for nonparticipation. *See, e.g., Overland*, 996 F.2d at 360, n.4.

Second, Petitioners note in paragraph 2 of their Statement that "[i]f a carrier fails to pay the fee for renewing its participation in the guide, *after a number of efforts* advising the carrier of the delinquency and the impending cancellation, HGCB [Household Goods Carriers Bureau] will delete its name as a participant in subsequent editions of the distance guide." *See* Petition at 4, n. 1 (emphasis added). However, the record below amply demonstrates that Overland never received any notice of its cancellation, and the Household Goods Carriers Bureau records show no evidence of ever having notified Overland of its delinquency.

REASONS FOR DENYING THE WRIT

The courts of appeal are divided in response to the question presented herein. On October 18, 1993, this Court granted the petition for writ of certiorari in *Security Services, Inc. v. K-Mart Corp.*, 996 F.2d 1516 (3d Cir. 1993), *cert. granted*, 1993 W.L. 345661, 62 U.S.L.W. 3165 (Oct. 18, 1993). As a result, Respondent opposes the issuance of a writ of certiorari at this time. Respondent concurs with Petitioners that should this Court grant a writ of certiorari, this case should be held in abeyance pending the resolution of the *K-Mart* case.

CONCLUSION

For the foregoing reasons, the Petition of the Interstate Commerce Commission and the United States of America should be denied, or in the alternative, held in abeyance pending the resolution of *Security Services, Inc. v. K-Mart Corp.*

Respectfully submitted,

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